

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT STEVEN RALPH,

Defendant-Appellant.

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UNPUBLISHED  
October 20, 2000

No. 216049  
Ionia Circuit Court  
LC No. 98-011247-FH

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with a dangerous weapon, MCL 750.82(1); MSA 28.277(1), and two counts of carrying a concealed weapon, MCL 750.227(1); MSA 28.424(1). He was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to concurrent prison terms of two to six years for the assault conviction and two to 7½ years for each of the CCW convictions. Defendant appeals as of right. We affirm.

Defendant first argues that his convictions must be reversed because “the complainant subjected him to reprehensible conduct and an illegal private arrest.” Appellate consideration of an unpreserved claim of error is disfavored. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Defendant raises this issue for the first time on appeal, and we decline to address it.

Defendant next argues that he was denied a fair trial by improper prosecutorial remarks. Because defendant failed to object to the alleged improper remarks, appellate relief is precluded unless an instruction could not have cured the prejudicial effect or unless the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We have evaluated the challenged remarks in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and conclude that any arguable impropriety in the remarks could have been cured by a cautionary instruction. *Stanaway*, *supra* at 687.

Defendant also argues that he was denied the effective assistance of counsel. We review claims of ineffective assistance of counsel to determine (1) whether counsel’s performance fell below an objectively reasonable standard, (2) whether there is a reasonable probability that, but for counsel’s

error, the result of the proceedings would have been different, and (3) whether the result of the proceeding was fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that his counsel erred by failing to challenge the admissibility of testimony by his employer's security guard that was irrelevant and tended to imply that defendant was considered a security risk before the incident giving rise to the charges against him. At defendant's *Ginther*<sup>1</sup> hearing, defense counsel testified that he reviewed the guard's pretrial statements and believed that the guard would provide relevant testimony tying defendant's discharge to the incident in question and that the guard's testimony would not reflect unfavorably on defendant's trial position. At the hearing, the court found the challenged testimony to be of limited value but not irrelevant and of little consequence to the outcome of the case. We agree. While defense counsel evidently did not perceive that the jury might infer from the testimony that defendant was a security risk before the incident, the effect of this possible inference could only have been slight since the jury rejected the charge of assault with intent to great bodily harm less than murder and instead focused on the altercation that led to the stabbing. Thus, we conclude that defense counsel's failure to object to the testimony did not deprive defendant of a more favorable outcome. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Defendant further contends that defense counsel erred by failing to investigate and discover evidence that would have bolstered defendant's testimony and discredited that of the complainant's wife. However, because the jury evidently rejected the prosecution's theory that defendant had a dark motive for driving around the complainant's neighborhood, the credibility of the complainant's wife, who was not a witness to the altercations that resulted in defendant's conviction, would not have played a role in the outcome of trial. *Id.*

Defendant additionally suggests that counsel erred by failing to object to the allegedly improper prosecutorial remarks. We disagree. The invitation to the jurors to place themselves in the positions of the complainant and his wife, although a construction that risks inviting the jurors to sympathize with the complainant and convict defendant on that basis, was at its crux an invitation to the jurors to evaluate whether the complainant's behavior was unreasonable under the circumstances and thereby relevant to defendant's claim of self-defense. The brief remark in the rebuttal argument was responsive to defense counsel's attack on the complainant's credibility and did not add substantially to any argument. Furthermore, any arguable harm from the remarks was insubstantial, and did not affect the outcome of the trial.

Defendant also argues that his counsel erred by failing to challenge the legality of the complainant's alleged stalking and illegal citizens arrest of defendant. We conclude that no evidence supports defendant's belated claim of illegal arrest, and therefore we must conclude that defense counsel committed no error by failing to raise this issue at trial.

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Next, defendant argues that counsel erred by failing to move to disqualify the Ionia County Prosecutor's Office because the prominence of the complainant's family name produced a conflict of interest and the abandonment of prosecutorial discretion in charging defendant. The disqualification of a prosecutor may be necessary because of a conflict of interest where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused. *People v Mayhew*, 236 Mich App 112, 127; 600 NW2d 370 (1999). The defendant need not prove actual bad faith or unethical conduct; the appearance of impropriety is sufficient to justify a disqualification. *People v Doyle*, 159 Mich App 632, 644; 406 NW2d 893, modified on other grounds 161 Mich App 743 (1987). However, no appearance of impropriety arises unless facts demonstrate an emotional or personal stake in the litigation that warrants disqualification. *Id.* at 646. Defendant has presented no facts that demonstrate that the prosecutor had a personal, financial, or emotional interest in the litigation or a personal relationship with the accused or with the complainant. Therefore, we conclude that defense counsel did not fail to function as effective trial counsel by failing to move for the disqualification. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997); *People v Gist*, 188 Mich App 610, 613, 470 NW2d 475 (1991).

Defendant argues that the cumulative effect of defense counsel's errors requires reversal of his convictions. While no one error provides a basis for reversal, the cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). We reject defendant's argument because defendant suffered no discernible prejudice as a result of defense counsel's performance.

Finally, defendant claims that he was denied a fair trial by the prosecutor's attempt to question a witness regarding a police report had not been provided to defense counsel. We disagree.

MCR 6.201(B)(2) makes discoverable "any police report concerning the case, except so much of a report as concerns a continuing investigation." MCR 6.201(J) provides that on failure to comply with the provision of the rule, "the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy." In this case, defense counsel sought a bench conference and the prosecutor chose to dismiss the witness. Thus, the testimony was in fact excluded. Because of the tangential nature of the testimony, we conclude that the court would not have found it necessary to resort to a more drastic remedy.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ Gary R. McDonald